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No. 10-617

In the Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent advances two arguments against certiorari. First, it contends that there is no conflict among the lower courts regarding the question presented. Second, it argues that the facts of this case do not present the question set forth in the petition.

Both of these claims are wrong. Not only is the conflict among the lower courts clear from the text of their opinions, but the conflict is reflected as well in the division among the judges on the two appellate courts below—with the majority and dissenting opinions expressly applying different legal standards grounded in the divergent approaches of the federal and state appellate courts. And the fact that the two sets of judges below reached opposite conclusions by applying different legal standards demonstrates that this case is an appropriate vehicle for resolving the conflict—the opinions below make clear that the outcome of the case turns upon the legal standard that is applied.

Respondent's erroneous contentions appear to stem from its view that "the decisions rendered in the cases cited [in the petition] were the result of the distinctive set of facts presented in each." Opp. 3. If that were true, of course, this Court would never grant review in a case involving the application of the due process "minimum contacts" standard.

In fact, this Court has granted review in cases, like this one, that raised a question regarding the application of this Court's due process precedents in a frequently recurring factual setting on which the lower courts had divided. Review is warranted here for the very same reasons.

Finally, respondent does not even attempt to dispute the very substantial importance of the issue presented, which is confirmed by the amicus brief submitted by the Center for Democracy & Technology. The Court should grant the petition to clarify the confusion that now exists with regard to this frequently-recurring question involving application of this Court's minimum contacts jurisprudence.

A. There Is A Clear, Recognized Conflict Among The Lower Courts.

Respondent contends that there is no conflict because all of the lower courts are "endeavor[ing] to apply settled principles of Fourteenth Amendment law" established in *Calder* v. *Jones*, 465 U.S. 783 (1984). Opp. 2. The fact that lower courts agree that *Calder* is the relevant decision of this Court, however, does not mean that they agree on how *Calder* applies in the context of Internet defamation actions. To the contrary, the lower courts are clearly divided as to what *Calder* requires in the Internet context.

The division among the lower courts is mirrored explicitly in the opinions of the courts below. The majorities concluded that "because Ohio is the location of [respondent's] base of operations," and because "Roberts knew * * * that the brunt of the harm caused [would] be felt by [respondent] in Ohio," the "focal point of the damage was Ohio." Pet. App. 23a; see also Pet. App. 44a ("Ohio is the focal point both of the defamation and of the harm suffered."). And that, they determined, was sufficient to permit the exercise of personal jurisdiction.

The dissenters, on the other hand, concluded that Roberts's knowledge that the harm would be felt in Ohio was not by itself sufficient. Rather, addi-

tional evidence of Roberts's targeting of Ohio was required to permit Ohio courts to assert jurisdiction: because there was "no evidence [that] Roberts targeted * * * *Ohio residents* via the bulletin board," he did not create the minimum contacts with Ohio necessary for jurisdiction. Pet. App. 47a (emphasis added). The dissent in the Ohio Supreme Court reached the same conclusion. Pet. App. 29a (stating that posting comments to general websites that "are [no] more likely to be viewed by a resident of Ohio than by a resident of any other state" does not establish minimum contacts with Ohio).

Had petitioner channeled his comments directly and primarily to an Ohio audience by posting on a website geared towards Ohio,[1] it would have been clear that petitioner was targeting *Ohio* (like the defendants in *Calder*, whose publication was significantly marketed in California), and the dissenters would have found the assertion of personal jurisdiction permissible. See Pet. App. 29a (noting that petitioner posted comments on general national websites, "none of which have any specific connection" to the forum State); Pet. App. 47a (commenting that there was "no evidence or allegation Roberts directly targeted, solicited or interacted with Ohio residents").

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[1] Geographically targeted websites exist. For example, Local.com hosts information and comments about local and state businesses. Personal jurisdiction has been upheld where, in contrast to this case, the defendant posted his comments on websites geared towards the plaintiff's locale, thereby making clear his targeting of the *forum state*. See *Zidon* v. *Pickrell*, 344 F. Supp. 2d 624, 631-632 (D.N.D. 2004).

That is the very same division reflected generally in the decisions of the federal courts of appeals and state courts. The courts applying a "knowledge-plus" standard distinguish between facts showing that the defendant intended to affect the plaintiff and those showing that the defendant engaged in conduct that targeted a particular State in addition to the plaintiff. Those courts applying a "knowledge" standard find that a reference to the plaintiff with knowledge of the plaintiff's location is sufficient. See Pet. 10-11. Respondent's attempts to explain away this clear conflict are wholly unavailing.

To begin with, beyond highlighting that the Seventh Circuit and the New Jersey Supreme Court both cite *Calder*, Opp. 2-3, respondent in no way disputes that the Seventh Circuit and New Jersey apply a knowledge standard in Internet intentional tort cases. See Pet. 14-16.

Respondent's attempts to deny the existence of the conflicting knowledge-plus standard applied by a number of lower courts are entirely unpersuasive. Thus, the Eighth Circuit held that a defendant who posted negative remarks on a national website intending to affect the plaintiff, and stated that the plaintiff was a resident of the forum State, did not "expressly aim" their conduct at the forum, because the remarks were merely "aimed at the [plaintiff] * * * [and] incidental" to the forum. *Johnson* v. *Arden*, 614 F.3d 785, 796 (8th Cir. 2010).

Respondent is simply wrong in attempting to distinguish this case by asserting that Roberts's "prior transactional history with [respondent]" makes the Eighth Circuit's standard "clearly distinguishable" from the case below. Opp. 12. Not only did the defendant in *Johnson* have an even more significant

transactional history—she had purchased sixteen cats on behalf of the plaintiff—but the defendant had also previously "provided [unpaid] administrative assistance" to the plaintiff's business. *Johnson*, 614 F.3d at 788. The Eighth Circuit's decision thus directly conflicts with the decision below: both courts confronted similar facts, but applied different legal standards and reached different results, thereby demonstrating the existence of a clear conflict among the lower courts.

Likewise, the Minnesota Supreme Court in *Griffis* expressly rejected a "knowledge" standard, stating that defendant's "intentional tortious conduct" was not sufficient to permit the assertion of jurisdiction under *Calder* "even if [defendant] knew * * * that [her] defamatory statements about [plaintiff] would affect [plaintiff] in her home state * * *." *Griffis* v. *Luban*, 646 N.W.2d 527, 536-537 (Minn. 2002). The *Griffis* standard is thus more demanding than either the Seventh Circuit's knowledge standard, *Tamburo* v. *Dworkin*, 601 F.3d 693, 706 (7th Cir. 2010) (defendants "aimed their tortious conduct at * * * Illinois" when they posted intentionally tortious material to the Internet "with the knowledge that [plaintiff] lived, worked, and would suffer the 'brunt of the injury' there"), or the New Jersey Supreme Court's standard which requires the mere electronic publication of intentionally tortious material and the "knowledge or purpose of causing harm" in the forum State. *Blakey* v. *Continental Airlines*, 751 A.2d 538, 556 (N.J. 2000).

The *Griffis* standard is also more demanding than the test applied by the majority below. Compare Pet. 23a (stating that "because Ohio is the location of [respondent's] base of operations," and because "Rob-

erts knew * * * that the brunt of the harm caused [would] be felt by [respondent] in Ohio," the "focal point of the damage was Ohio"), with *Griffis*, 646 N.W.2d at 536-537 ("[E]ven if [defendant] knew * * * that defamatory statements about [plaintiff] would affect her in her home state of Alabama, that * * * is not enough to demonstrate that Alabama was the focal point of [defendant's] tortious conduct.").

And as the dissent below recognized, see Pet. App. 30a-31a, the standard applied by the majority in this case is flatly inconsistent with the Fourth Circuit's requirement that an Internet posting must "manifest an intent to target and focus on [forum State] readers" through facts in addition to knowledge of the plaintiff's residence. *Young* v. *New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002); *cf. ESAB Group, Inc.* v. *Centricut, Inc.*, 126 F.3d 617, 625-626 (4th Cir. 1997) (non-Internet case noting difference between trying to harm a business throughout the United States, and trying to harm a business in South Carolina, and concluding only the later supports *Calder* jurisdiction).

Respondent's attempt to distinguish *Young* and *Griffis* on the grounds of an "absence of proof of 'express aiming,'" Opp. 11, begs the question—which is the sharply different standards that the lower courts are applying in determining what constitutes express aiming for purposes of due process analysis.

Next, respondent's observation that the defendant in *Revell* v. *Lidov*, 317 F.3d 467 (5th Cir. 2002) lacked knowledge of the plaintiff's residence does not change the fact that the *Revell* court articulated a standard requiring proof in addition to knowledge of the plaintiff's location. See Pet. 13.

Finally, the Third Circuit also plainly applies a knowledge-plus standard in Internet intentional tort cases. While *IMO* is indeed a non-Internet case, see Opp. 9 n.1, that decision specifically rejects a knowledge standard. See *IMO Industries, Inc.* v. *Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998); Pet. 12-13. And the Third Circuit subsequently made clear that Internet cases are subject to the *IMO* rule. See *Toys "R" Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 455 & n.6 (3d Cir. 2003); Pet. 13.[2] Satisfying that standard requires plaintiffs to demonstrate facts in addition to knowledge of the plaintiff's location such as (1) that a defamatory posting was "targeted at . . . anyone in [the forum State] other than [plaintiff]," or (2) that the forum State had "a unique relationship with [the posting's target]," akin to the unique relationship California has with the movie industry, which was found to be dispositive in *Calder*. *Marten* v. *Godwin*, 499 F.3d 290, 298 (3d Cir. 2007) (internal quotation marks omitted).

In sum, there can be no doubt that there is a square conflict among the lower courts, with some courts applying a knowledge-plus standard more demanding than the due process standard applied by the majority below and by the Seventh Circuit and New Jersey Supreme Court.

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[2] Indeed, district courts within the Third Circuit have applied the *IMO* standard in Internet cases for over a decade. See *Gorman* v. *Jacobs*, 597 F. Supp. 2d 541, 547 (E.D. Pa. 2009); *Barrett* v. *Catacombs Press*, 44 F. Supp. 2d 717, 730 (E.D. Pa. 1999).

B. This Case Is An Ideal Vehicle For Resolving The Question Presented.

This case provides a particularly suitable factual context for resolving the lower courts' conflicting views regarding the due process standard for personal jurisdiction in Internet intentional tort cases.

To begin with, the divided rulings by both appellate courts below—resting on the application of different legal standards by the majority and dissent in each case—demonstrate that the outcome of this case turns on which legal standard is applied. See pages 2-3, *supra*.

Respondent strives mightily to argue that the result below turns on facts unrelated to the question presented. But, as the decisions themselves make clear, the legal standard requiring only that the plaintiff show that the defendant knew where the plaintiff was located was in fact determinative of the due process inquiry.

First, respondent is wrong in suggesting, Opp. 7-8, that the court below found that petitioner's commercial transaction constituted a connection with Ohio sufficient to give rise to jurisdiction under *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). The majority simply cited *Burger King* in its overview of personal jurisdiction, Pet. App. 15a, before resting its ruling squarely on the *Calder* test. See Pet. App. 16a-23a; see also Pet. App. 30a n.1. (O'Donnell, J., dissenting).[3]

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[3] Indeed, the language from the majority opinion quoted by respondent, see Opp. 8, simply made clear that the cause of action was sufficiently related to petitioner's Ohio contacts to permit analysis as an assertion of specific jurisdiction, rather than

Second, respondent is wrong in claiming that the transaction between petitioner and respondent constituted a connection sufficient to satisfy the knowledge-plus test, and that this case accordingly does not provide a suitable vehicle for addressing the conflict among the lower courts. See Opp. 12. As an initial matter, the dissenters below—who adopted the knowledge-plus standard—plainly concluded that the transaction between the plaintiff and defendant was not determinative under the knowledge-plus test, otherwise they would have concurred in the result reached by the majority.

That conclusion is consistent with the approaches of the other courts applying the knowledge-plus test, none of which has found a transactional relationship between the plaintiff and defendant sufficient to permit the assertion of personal jurisdiction. Thus, the Eighth Circuit case that respondent attempts to distinguish involved numerous commercial transactions, but the court nonetheless found the assertion of personal jurisdiction impermissible. See *Johnson*, 614 F.3d at 795-797.

Indeed, if the existence of a transaction between plaintiff and defendant, combined with the defendant's knowledge of the plaintiff's location, were sufficient to permit personal jurisdiction under the knowledge-plus approach, numerous lower court decisions would have come out differently, because

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general, jurisdiction. See Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1067.1 (3d ed. Westlaw 2010) ("Jurisdiction under a long-arm statute is a paradigm of specific jurisdiction. * * * [W]hen the cause of action * * * does not arise from the defendant's contacts with the forum state and specific jurisdiction is unavailable, the plaintiff must attempt to invoke general jurisdiction * * *.") (footnotes omitted).

many of them arose following a transaction between the parties. See, *e.g.*, *Marten*, 499 F.3d at 293-294; *Machulsky* v. *Hall*, 210 F. Supp. 2d 531, 533 (D.N.J. 2002).

The reason the presence of a transaction is irrelevant is that the knowledge-plus standard requires proof that the defendant's statements targeted the forum State. Pet. 12-14. The fact that the postings arose after a single online purchase could not constitute a plus factor because the underlying transaction in no way indicates that the defendant posted with intent to target a particular State's audience.[4]

In addition to illustrating the conflict among the lower courts, the factual situation presented here is ideal for resolving it. Petitioner's activities fall precisely on the line that marks the division between courts applying a knowledge standard and those applying a knowledge-plus standard: While there is evidence that petitioner intended his online statements to affect respondent and also knew that respondent was based in Ohio, Pet. App. 22a-23a, there is no evidence of the additional targeting of the forum State that knowledge-plus jurisdictions require. See Pet. App. 3a (stating that petitioner's "commen-

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[4] Respondent also points out that the majority below cited the fact that five Ohioans had read Roberts's posts. Opp. 13-14. Again, that fact is irrelevant under the knowledge-plus standard because it provides no evidence regarding the targeting of the forum State. And permitting reliance on that fact would render the knowledge-plus standard the equivalent of the knowledge standard: given the ubiquity of the Internet, it always will be possible to identify a few residents of a forum State who have viewed posts on a website that in no way targeted that State.

tary appeared on the public-forum section of [auto-racing] websites"); Pet. App. 29a (O'Donnell, J., dissenting) (observing that the sites were "*general* auto-racing websites * * * none of which have any specific connection to Ohio") (emphasis added).

Granting review here will enable the Court to resolve the conflict among the lower courts and provide clear guidance regarding the requirements of due process in this frequently-recurring setting.

C. The Issue Presented Is Important to a Broad Range of Individuals and Businesses.

This Court has recognized the Internet as a "unique and wholly new medium of worldwide human communication" that enables users to "address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno* v. *ACLU*, 521 U.S. 844, 850, 853 (1997).

The unique nature of the Internet—"located in no particular geographical location but available to anyone, anywhere in the world" (*id.* at 851)—has produced a "massive increase in the number and diversity of speakers who could face litigation in distant forums." CDT Br. 7; see also Pet. 16 n.4 (citing forty-one decisions addressing due process limits on personal jurisdiction based on Internet expression).

As the Center for Democracy & Technology explains, uncertain jurisdictional standards threaten to "stifle the twenty-first century's most vibrant forum for free expression," CDT Br. 6, as well as deter the growth of Internet commerce. CDT Br. 7-10; see also David Post, *Kill* Calder *v.* Jones!, The Volokh Conspiracy, Nov. 19, 2010, http://volokh.com/2010/11/19/kill-calder-v-jones/

(commenting that Ohio's rule is "profoundly odd and misguided," and that applying *Calder* has "given the lower courts fits over the years," resulting in "a hopeless swamp of uncertainty"); Pet. 19-20 & n.8 (citing fourteen commentators lamenting the confusion among the lower courts regarding the due process standard for personal jurisdiction in cases involving Internet expression). The Court should grant review to clarify the due process standard governing personal jurisdiction in this extremely important context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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